Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF
NEW YORK

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Supreme Court of the United States

October Term, 1960

No.

In the Matter of the Application of

THE CITY OF NEW YORK, relative to acquiring title to certain real property, where not heretofore acquired, by the City, in the area bounded by Bronx River, East Bay Avenue, Halleck Street and Lafayette Avenue, in the Borough of the Bronx, City of New York, duly selected as a site for the New York City Terminal Market (Hunts Point Area, Bronx).

CITY OF NEW YORK,

Respondent,

against

MOSES DANIEL COHAN, HENRY I. COHAN and ESSIE M. COHAN,

Petitioners-Appellants.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petition

The petitioners, Moses Daniel Cohan, Henry I. Cohan and Essie M. Cohen, respectfully show to this Court and allege:

1. The petitioners are citizens of the United States and at the time of the commencement of this proceeding, were the owners of certain real property in the County of Bronx, State of New York, known as Lot 170, Block 2770 and Lot 232, Block 2773 on the land map of the County of Bronx, State of New York.

2. That the application of The City of New York in the Supreme Court of the State of New York, County of Bronx, was to condemn said real property, take it from the petitioners and lease it out to other private parties under the guise that it was to be operated as a public market for the purpose of selling fresh fruits and vegetables, and the respondent conceded in their printed brief that respondent intended lessees could enjoy therefrom "incidental benefit".

Statement

Respondent, The City of New York, condemned petitioners-appellants' real property known as Lot No. 70, Block 2770 and Lot No. 232, Block 2773 of the Land Map of the City of New York, Borough of Bronx, for the purpose of leasing it to other persons in order that they conduct the business of selling fresh fruits and vegetables for themselves. The appellants appeared in the Supreme Court of the State of New York, Bronx County, and objected to such condemnation of their real property, but their objections were overruled. The appellants thereafter appealed to the Appellate Division of the Supreme Court of the State of New York from said order of condemnation, which, however, denied relief to the appellants; that thereafter the appellants applied to the Court of Appeals of the State of New York, which is the court of last resort in said state, to review said condemnation of appellants' property, but relief was denied on April 20, 1961. A certified copy of the order of the Court of Appeals of the State of New York is annexed thereto.

In opposing the application in the Supreme Court of the State of New York, an affidavit was submitted by Sidney S. Levine, petitioners' attorney, stating in part:

> "Moses Daniel Cohan, Henry I. Cohan and Essie M. Cohan oppose this motion to condemn the property on the ground that it not only is in violation of the Constitution of the State of New York, but of the Constitution of the United States."

That the petitioner, Moses Daniel Cohan, in opposing the application of The City of New York (respondent in said Court) stated in part as follows:

> "The background of this application is that the Washington Market which is owned by private corporations or individuals in lower Manhattan, is to be substituted by a market in Hunts Point, Bronx, New York, to be known as 'Washington Market', however, the City of New York has no right under the Constitution of the State of New York, to condemn real property and then rent it out to private individuals who are to sell fresh fruits and vegetables and in one instance, there is a part of the land to be condemned and rented out as a gas station to a private individual."

No reply affidavits were submitted by The City of New York to the answering affidavit of appellants.

The Supreme Court of the State of New York granted the application of The City of New York by orders dated the 22nd day of June, 1960 and the petitioners' property was thereby seized from them and became the property of The City of New York.

An appeal was taken from said order to the Appellate Division of the Supreme Court. It denied petitioners any relief and dismissed their appeal and thereafter the petitioners applied to the Court of Appeals of the State of New York, which was the court of last resort in that state, and said Court refused to review the orders of the lower Courts in condemning petitioners' property and denied the petitioners' motion for leave to appeal from the orders of the lower Court by its order dated the 20th day of April, 1961, a certified copy of which is hereto annexed and made a part hereof.

While the Court of Appeals of the State of New York and the Appellate Division of the Supreme Court of the State of New York refused to review the order of condemnation which seized the petitioners' property, still

that does not prevent this Court from protecting petitioners when their property had been condemned and seized from them without due process of law, contrary to the 5th and 14th Amendments of the Constitution of the United States.

That petitioners' attorney submitted Federal authorities to show that said condemnation and seizure was in violation of the Constitution of the United States; *Panama Refinery* v. *Ryan*, 293 U. S. 358; *United States* v. *Certain Land*, 78 Federal Report (2d) 684.

The constitutional rights of the petition was stressed by the petitioners' attorney in his brief, wherein he stated on page 17:

> "The principle was forcibly stated in *United States* v. *Certain Land* (*supra*), where the Court citing with approval *Panama Refinery* v. *Ryan* (*supra*), stated:
>
> 'We place our decision upon the second objection to the proceeding, viz., the lack of right in the government to exercise the power of eminent domain for the purposes contemplated by the act.
>
> * * *
>
> "The taking of one citizen's property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment, is not" within the scope and power of the government.'"

Thus, there is only one constitutional question involved in this certiorari and that is "Can any city, state or government in the United States condemn and seize an individual's property for the purpose of leasing it to others for profit?" Hereto appended is a Certificate of Merit of Sidney S. Levine, former License Commissioner of the City of New York, and a member of the Bar of this Court, and who is the attorney in this application.

That hereto annexed is petitioners' brief on this application. That submitted in this application is a printed

record of the proceedings in the Courts of the State of New York with the briefs.

WHEREFORE, your petitioners pray this honorable Court that a writ of certiorari be issued therein to the Court of Appeals of the State of New York, to the Appellate Division of the State of New York and to the Supreme Court of the State of New York, Bronx County, that the issues of law herein may be reviewed by this Court.

That no previous application has been made for this or similar relief.

Dated: New York, May 11, 1961.

MOSES DAVID COHAN,
By SIDNEY S. LEVINE,
Attorney for Petitioners.

Argument

Final relief for the petitioners-appellants was denied by the Court of Appeals of the State of New York on the 20th day of April, 1961, which was the court of last resort in that state. The respondent, the City of New York, has seized and condemned petitioners-appellants real property in the State of New York for the purpose of leasing it to other persons on the theory that it was for the purpose of establishing a market for the sale of fresh fruits and vegetables. The lessees of the property to be leased for the city are to enjoy the profits for the conducting of the sale of fresh fruits and vegetables. The petitioners contend that the condemnation of real property for such purpose is in violation of the Constitution of the United States.

The acquisition of appellants' land by the respondent for the purpose of leasing or renting it out to others for the sale of fresh fruit and vegetables is in violation of the appellants' constitutional rights.

It was stated by this court in the case *In re Board of Transportation of New York*, 272 N. Y. 52 by Crane, C.J.

> "There is no constitutional right to appeal in proceedings to take property for public use."

The taking of property of one individual to lease it to another under the guise, that is, to be a public market, is unconstitutional and not for public use as the only profit thereby is the lessee of the property condemned.

The undisputed facts are that the respondent, The City of New York, is desirous of closing Washington Market in lower Manhattan and transferring the market to the Hunts Point section of the Bronx.

The present Washington Market is owned by private individuals, either as owners of the land or tenants.

The purpose of condemning the land described in the petition is for the City to rent or lease divers parcels of land to various tenants for the purpose of selling fresh fruits and vegetables.

No one ever contended that the general public in the Borough of the Bronx or elsewhere in the City of New York were ever in need of fresh fruit and vegetables.

The condemnation of the appellants' land is therefore in violation of their constitutional rights.

Panama Refinery v. *Ryan*, 293 U. S. 358;
United States v. *Certain Land*, 78 Federal Reporter (2d) 684;
Matter of Tuthill, 163 N. Y. 133;
The People ex rel. Herrick v. *Smith*, 21 N. Y. 595;
New York City Housing Authority v. *Muller*, 270 N. Y. 333.

Although in the case of *New York City Housing Authority v. Muller* (*supra*), the condemnation was for slum clearance, which all recognize is for improvement for health and social conditions, the Court sustained the acquisition of the land under eminent domain, but the Court of Appeals specifically stated by Crouch, J.:

> "Nothing is better settled than that the property of one individual, cannot, without his consent, be devoted to the private use of another even when there is an incidental or colorable benefit to the public."

Thus the taking of the appellants' property by the City and leasing it to a fruit or vegetable merchant so that he may make a profit therefrom is in direct violation of the Constitution of the State of New York and the Constitution of the United States.

And again in the *Matter of Tuthill* (*supra*), the Court of Appeals said by Gray, J.:

> "The State Constitution, from the beginning, by authorizing the appropriation of private property for public use, impliedly, declared that for any other use private property should not be taken from one and applied to the private use of another. (Matter of Albany Street, 11 Wend. 149.)"

> It was observed by Judge Denio in People v. Smith (21 N. Y. at p. 598), that it would not be due process of law to 'appropriate the property of one citizen for the use of another, or to confiscate the property of one person or, a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use'."

The principle was forcibly stated in *United States v. Certain Lands* (*supra*), where the Court citing with approval *Panama Refining v. Ryan* (*supra*), stated:

> "We place our decision upon the second objection to the proceeding, viz., the lack of right in the gov-

ernment to exercise the power of eminent domain for the purposes contemplated by the act.

* * *

"The taking of one citizen's property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment, is not within the scope and power of the government."

While the appellants concede that it is fairly well settled that a citizen's land may be condemned for slum clearance purposes, it cannot be condemned and taken away from a citizen solely for the purpose of renting or leasing it to another citizen for commercial purposes, particularly where the appellants have pointed out in the answering affidavit that at the time of the filing of the petition for condemnation, they were negotiating with a certain oil company for the purpose of leasing their property for a gas station for the sale of gas and oil, and at the last moment the appellants were advised that inasmuch as the City was taking over the property, they would not have any further interest in leasing same (fols. 61 and 62).

Thus, the entry of the Orders of condemnation even violated the principle in the early case of *People* v. *Smith* (*supra*), where the Court of Appeals said by Denio, J.:

"In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use. (The People v. The Mayor of Brooklyn, 4 Comst., 419; Taylor v. Porter, 4 Hill, 140; Wynehamer v. The People, 3 Kern. 378.)"

In re Board of Transportation of New York, 272 N. Y. 52 is not in point as the property in that case was con-

demned for the extension of a railroad for the benefit of the public

Thus, it is manifest that the condemnation of appellants' property is merely for the purpose of leasing it to others for a rental which is in direct violation of the appellants' constitutional rights.

CONCLUSION

The application for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY S. LEVINE,
Attorney for Petitioners-Appellants

APPENDIX

Order Dismissing Appeal

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 17th day of January, 1961.

Present:

HON. BERNARD BOTEIN,
Presiding Justice,

CHARLES D. BREITEL,
JAMES B. M. McNALLY,
HAROLD A. STEVENS,
FRANCIS BERGAN,
Justices.

3154

In the Matter of the Application of The City of New York, relative to acquiring title to certain real property, where not heretofore acquired by the City, in the area bounded by Bronx River, East Bay Avenue, Halleck Street and Lafayette Avenue, in the Borough of the Bronx, City of New York, duly selected as a site for the New York City Terminal Market (Hunts Point Area, Bronx).

CITY OF NEW YORK,
Petitioner-Respondent,

vs.

MOSES DANIEL COHAN, HENRY I. COHAN and ESSIE M. COHAN,
Objectants-Appellants.

An appeal having been taken to this Court by the objectants-appellants from an order of the Supreme Court,

Per Curiam Decision of the Appellate Division Dismissing the Appeal

Bronx County, entered on the 22nd day of June, 1960, granting petitioner-respondent's petition to condemn certain real property known as Lot 170 of Block 2770 and Lot 232 of Block 2723, of Section #10 of the Tax Map of the City of New York, for the Borough of Bronx, and said appeal having been argued by Mr. Sidney S. Levine of counsel for the appellants, and by Mr. Milton H. Harris of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the appeal from the said order be and the same is hereby dismissed, with $20 costs and disbursements to respondent.

Enter:

VINCENT A. MASSI,
Clerk.

Per Curiam Decision of the Appellate Division Dismissing the Appeal

Appeal from order entered June 21, 1960, granting respondent's petition to condemn certain real property unanimously dismissed, with $20 costs and disbursements to petitioner-respondent. An appeal may not lie from an intermediate decree in a condemnation proceeding brought under the Administrative Code (N. Y. City Administrative Code, Sec. B15-25.0).

Order Denying Leave to Appeal to the Court of Appeals

STATE OF NEW YORK

IN

COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twentieth day of April A. D. 1961.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, Presiding.

Mo. No. 260

In the Matter

of

The Application of The City of New York, relative to acquiring title to certain real property, where not heretofore acquired by the City, in the area bounded by Bronx River, East Bay Avenue, Halleck Street and Lafayette Avenue, in the Borough of the Bronx, City of New York, &c.

CITY OF NEW YORK,

Respondent,

vs.

MOSES DANIEL COHAN, HENRY I. COHAN and ESSIE M. COHAN,

Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part

Order Denying Leave to Appeal to the Court of Appeals

of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy.

RAYMOND J. CANNON
Clerk

(SEAL)